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Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Security Council
Sixty-seventh year

Letter dated 6 December 2012 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General

I have the honour to forward, enclosed herewith, the analysis of the proceedings against the accused Ante Gotovina, Ivan Cermak and Mladen Markac (annex I) and the analysis of the proceedings against the accused Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj (annex II), prepared by the Office of the National Council of the Republic of Serbia for Cooperation with the International Criminal Tribunal for the Former Yugoslavia.

I should be grateful if you would have the present letter and its annexes circulated as a document of the General Assembly, under agenda item 73, and of the Security Council.

(*Signed*) Feodor **Starčević**

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Annexes to the letter dated 6 December 2012 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General

Annex I

Proceedings against the accuscd Ante Gotovina, Ivan Cermak and Mladen Markac

1. According to the indictment of the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia against the accused Gotovina, Cermak and Markac of 12 March 2008, Croatia on 4 August 1995 commenced the military offensive *Oluja* with the aim of retaking the Krajina territory.

2. On 7 August 1995, the Government of Croatia stated that the operation had been "successfully completed".

3. The Office of the Prosecutor of the Tribunal charged the accused with perpetrating crimes against humanity, in accordance with the statute of the Tribunal, and war crimes (violations of the laws or customs of war) as participants in a joint criminal enterprise, the objective of which was the permanent removal of the Serb population from the Krajina region. The accused are charged with individual criminal responsibility in accordance with article 7(1) of the statute of the Tribunal and command responsibility in accordance with article 7(3) of the statute of the Tribunal.

4. The Tribunal's Trial Chamber, in its judgment of 15 April 2011, found Gotovina and Markac guilty as participants in the joint criminal enterprise, according to the indictment, for persecution, deportation, murder and inhumane acts as crimes against humanity in accordance with article 5 of the statute of the Tribunal and for plunder of public and private property, wanton destruction, murder and cruel treatment in violation of the laws or customs of war in accordance with article 3 of the statute of the Tribunal and sentenced Gotovina to 24 years' imprisonment and Markac to 18 years' imprisonment, while the accused Ivan Cermak was acquitted of all charges.

5. In the judgment, which numbers more than 1,400 pages, the Trial Chamber found that there was a joint criminal enterprise that came into existence no later than July 1995, the objective of which was the permanent removal of the Serbian population from Krajina by the use of force or threat of force. The Trial Chamber found that participants in this joint criminal enterprise, beside the accused, belonged to the political and military leadership of Croatia — Franjo Tudjman, President of Croatia, Gojko Susak, Minister of Defence, Zvonimir Cervenko, Chief of Staff of the Croatian army and others. As is emphasized in the Trial Chamber's judgment, Tudjman and high-ranking military officials discussed at the Brioni meeting how the military forces should be used to ensure that not only the Serb Krajina army, but also the Serb civilian population, would leave Krajina. The Trial Chamber found that Croatian military forces and special police were used to commit the crimes within the objective of the joint criminal enterprise.

6. The Trial Chamber found that shelling of Benkovac, Knin, Obrovac and Gracac on 4 and 5 August 1995 represented unlawful attacks on civilians and

civilian objects, which represented an important element in committing the joint criminal enterprise.

7. However, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, composed of five judges and presided over by the President of the Tribunal, Judge Theodor Meron, reversed on 16 November 2012 the Trial Chamber judgment on Ante Gotovina and Mladen Markac and acquitted the accused of the crimes perpetrated during the Croatian forces' action *Oluja*. This judgment contains only 55 pages and was rendered by the outvoting of two of the Appeal Chamber judges by their three colleagues, accompanied by the fierce dissenting opinions of the two outvoted judges. Judge Fausto Pocar, former President of the Tribunal, emphasized that this verdict "contradicts any sense of justice" and described it as "grotesque". As well, Judge Agius, who was also in dissent with this judgment, used quite severe language in some parts of his dissenting opinion.

8. The Appeals Chamber decided, with the majority of the votes, that the Trial Chamber erred in its conclusion that all artillery impacts that were beyond 200 metres from military targets were unlawful. The Appeals Chamber found that this estimate of the Trial Chamber represented a cornerstone of the Trial Chamber's judgment in regard to the unlawful attacks on the towns in Krajina, with disregard, however, to the other reasons used by the Trial Chamber in its analysis that the artillery attacks were unlawful. The Appeals Chamber found that the 200-metre standard is arbitrary and devoid of any specific reasoning and concluded that without that standard there can be no unlawful attack on civilians, while without the unlawful attack on civilians there can be no joint criminal enterprise and, as a result, there is no guilt of the accused.

9. In this fashion, the Appeals Chamber did not fulfil its obligation in accordance with article 25 of the statute of the Tribunal and practice of the Tribunal that envisages that where the Appeals Chamber finds an error of law in the trial judgment arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly. More precisely, the Appeals Chamber, having concluded that the Trial Chamber had erred in its legal standard (according to which the Trial Chamber's "Impact Analysis" was premised on its conclusion that "a reasonable interpretation of the evidence" was that an artillery projectile fired by the Croatian Army which impacted within 200 metres of a legitimate target was deliberately fired at that target), had to define the correct legal standard, i.e., as Judge Pocar asks in his dissenting opinion, is the correct legal standard 400 metres, or maybe 1,000 metres or maybe 0 metres?

10. It is also interesting that the majority of the judges of the Appeals Chamber rejected in only three paragraphs of the appeals judgment the conclusions regarding unlawful shelling that were elaborated in the Trial Chamber's judgment of more than 200 pages. This approach enabled the Appeals Chamber to disregard the following facts listed in the Trial Chamber's judgment: that a large number of shells fell beyond 400 metres from any military target; that in one day approximately 1,000 shells fell on Knin alone, although no military resistance was coming from this city; that there are testimonies about the indiscriminate shelling, independently from the aforementioned 200-metre standard.

11. Judges Pocar and Agius state, contrary to the majority of the judges, that the conclusion of the Trial Chamber concerning the unlawful shelling is not, by any

circumstance, based exclusively on the allowed 200-metre margin of error, but on several mutually inclusive pieces of evidence that need to be considered in concert. The evidence in question includes transcripts from the Brioni meeting; Gotovina's order of 2 August 1995 in which he ordered the artillery to fire on the "Four Towns" in Krajina; evidence about the implementation of this order by the Croatian Army artillery; testimonies from the United Nations staff who were in Knin at the time; and the evidence of disproportionate shelling on the residence of Milan Martic. However, the majority of the Appeals Chamber judges simply quashed/disregarded the findings of the Trial Chamber as lacking the argumentative power to convince the objective spectator (or reasonable trier of fact) that artillery shellings were unlawful. In this manner, the Appeals Chamber, without any explanation, simply erased the conclusions of the Trial Chamber in regard to the evidence previously described.

12. The majority of judges of the Appeals Chamber obviously wrongfully stated some of the crucial evidence of the Trial Chamber, which leads to the conclusion that it could not have reviewed this evidence in a proper manner.

13. As an example of this we can use paragraph 87 of the Appeals Chamber judgment, which states in regard to the shelling of the Four Towns (Knin, Benkovac, Obrovac and Gracac) that "the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that in the factual context of Operation Storm, the Trial Chamber considered unlawful artillery attacks to be the core indicator that the crime of deportation had taken place. Thus the Trial Chamber held that Serb civilians' departures from settlements at the same time as or in the immediate aftermath of artillery attacks only constituted deportation where these artillery attacks were found to have been unlawful". Here the Appeals Chamber considers paragraph 1755 of the Trial Chamber judgment, which, however, **does not pertain to deportation from the Four Towns that were shelled, but to entirely other locations.** To make things worse, in paragraph 1755 of the Trial Chamber judgment there **is no discussion about deportations existing only in cases when the artillery shellings were unlawful.** As Judge Pocar observes in his dissenting opinion, the Trial Chamber judgment in paragraph 1754, continuing in paragraph 1755, reconfirms its finding that it had been determining if the reason why the civilians had been leaving their homes was fear of shelling, and not the unlawfulness of this type of shelling.

14. In paragraph 91 of the judgment, in regard to the Trial Chamber's findings about the existence of the joint criminal enterprise, the Appeals Chamber considers that the "conclusion that a JCE [joint criminal enterprise] existed was based on its overall assessment of several mutually-reinforcing findings, but that its findings on the JCE's core common purpose of forcibly removing Serb civilians from the Krajina rested primarily on the existence of unlawful artillery attacks against civilians and civilian objects in the Four Towns". **In this manner, the majority of judges of the Appeals Chamber once again interpret the findings of the Trial Chamber by twisting the meaning of what is stated in the Trial Chamber's judgment.**

15. At the end, the interpretation of the Brioni transcripts offered by the majority of the judges of the Appeals Chamber and described by Judge Pocar as grotesque should be emphasized as well. More precisely, the majority of the judges in paragraph 93 of the Appeals Chamber judgment state: "Portions of the Brioni Transcript can be interpreted, absent the context of unlawful artillery attacks, as

inconclusive with respect to the existence of a JCE, reflecting, for example, a lawful consensus on helping civilians temporarily depart from an area of conflict for reasons including legitimate military advantage and casualty reduction." The idea that an objective spectator could reasonably conclude from the Brioni transcripts, which, among others, include the words of Tudjman that "now is our chance to hit the Serbs so hard that they will disappear from these parts", that at this meeting agreement was reached in regard to providing help to Serbian civilians to temporarily leave the area of conflict is truly grotesque and unbelievable and could not be, according to the existing practice of the Tribunal, accepted as reasonable.

16. In addition to all this, it was very strange that the majority of the judges of the Appeals Chamber of the Tribunal, which was established by the United Nations, has so little trust in generals and other officials of high rank coming from the United Nations Member States, who were on the ground under the United Nations flag during the time of the events that were the subject of the Trial Chamber's decision and who gave their testimonies in relation to these events before the Trial Chamber.

17. When we talk about the effects of this judgment it is clear that the Tribunal has not sentenced and will not sentence anyone for more than 1,500 Serbs from Croatia killed and for more than 200,000 Serbs from Croatia forced to leave their homes, as well as for various other crimes committed against the civilian population in the action *Oluja*. This judgment not only failed to bring justice to the victims, but also, it could be stated, worsened sore spots and brought new pain to the victims and their families.

18. In closing, we would like to emphasize that for the purposes of these proceedings, the Republic of Serbia replied to all requests for assistance from the Office of the Prosecutor of the Tribunal. On the other hand, although the artillery diaries had been discussed for a long time as quite important for proving the indictment in these proceedings, the Republic of Croatia did not provide this documentation to the Tribunal, while the Tribunal receded from its request.

Annex II

Proceedings against the accused Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj

1. On 4 March 2005, the International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor, indicted the members of the so-called Kosovo Liberation Army (KLA) Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj.

2. The initial indictment charged the accused with 37 counts of crimes against humanity and war crimes (violations of the laws and customs of war) in the period from March to September 1998, according to individual criminal responsibility and/or as co-perpetrators in a joint criminal enterprise, the purpose of which was to consolidate the total control of the so-called KLA over the Dukagjin Operational Zone by the unlawful removal and mistreatment of Serb civilians and by the mistreatment of Kosovar Albanians, Kosovar Roma/Egyptian civilians and other civilians, who were, or were perceived to have been, collaborating with Serbian forces or otherwise not supporting the so-called KLA. The Office of the Prosecutor did not, for reasons that are unknown, indict Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj on the basis of command responsibility, regardless of the fact that the majority of the crimes for which they were indicted were perpetrated precisely at the commanding place of the so-called KLA in Jablanica.

3. The first proceedings that took place before the Trial Chamber in the period from 5 March 2007 to 3 April 2008, when the Trial Chamber rendered its judgment, were accompanied from the very beginning by incomprehensible mistakes by the Office of the Prosecutor and the acting Trial Chamber. This Trial Chamber allowed provisional release for Haradinaj and even his engagement in political activities, which represents a unique case in the Tribunal, even though at the time the Tribunal must have been aware of the fact that there was a problem in witness protection in relation to this case. The attitude of the representatives of the United Nations Interim Administration Mission in Kosovo (UNMIK) towards this case and the accused Haradinaj was very strange as well. In spite of the obvious problems, UNMIK offered guarantees for Haradinaj's provisional release, while the UNMIK chief at the time, Soren Jessen-Petersen, publicly spoke of Haradinaj as his friend. Taking into consideration the aforementioned, together with the fact that Carla Del Ponte, former Chief Prosecutor of the Tribunal, described in her book how the former chief of UNMIK, Soren Jessen-Petersen, and other UNMIK officials impeded cooperation with the Office of the Prosecutor of the Tribunal in these proceedings, the Republic of Serbia addressed the United Nations Secretary-General and, on several occasions, the officials of the Tribunal, with the request that these allegations be investigated.

4. In the end, it can be concluded that a number of potential witnesses in this case died under controversial circumstances, while some of the key witnesses, according to the estimate of the Office of the Prosecutor of the Tribunal, refused to testify before the Tribunal fearing for their personal safety (and it seems that this fear was reasonable).

5. On 3 April 2008, the Trial Chamber rendered its judgment: because of the lack of evidence, Ramush Haradinaj and Idriz Balaj were found not guilty on all counts of the indictment, while Lahi Brahimaj was sentenced to six years' imprisonment.

The acting Trial Chamber concluded that there was not enough evidence that crimes against humanity had been perpetrated since it was not convinced that the attacks on civilians were widespread and systematic, which is *conditio sine qua non* for the existence of crimes against humanity. Because of this, none of the accused was found responsible for this crime. On the other hand, the Trial Chamber concluded that murders and torture of civilians represent violation of the laws and customs of war. However, when deciding about the responsibility of the accused, the Trial Chamber concluded that there was not enough evidence in regard to the existence of the joint criminal enterprise. The Trial Chamber found Lahi Brahimaj guilty on the basis of individual criminal responsibility for cruel treatment and torture and sentenced him to six years' imprisonment.

6. On 21 July 2010, the Appeals Chamber of the Tribunal partially granted the prosecution's appeal and dismissed the appeal of the accused Brahimaj. The Appeals Chamber quashed the Trial Chamber's decisions in regard to six out of 37 counts of the indictment. More precisely, the accused Ramush Haradinaj and Idriz Balaj were found not guilty in regard to 31 counts of the initial indictment in the Appeals judgment and they will not stand trial for the crimes listed in these counts ever again.

7. The accused were charged with six counts of crimes of violation of the laws and customs of war. More precisely, the accused were charged for the deaths of only eight people[a] (seven murders and one death that occurred as a consequence of beating) and the torture of a number of individuals. The fact that is not the most important one, but that still is quite significant, is that only two of the eight victims were of Serbian nationality.[b] All events included in the revised indictment pertain to the period from 19 May 1998 to the end of July 1998.

8. The retrial of Haradinaj, Balaj and Brahimaj commenced on 18 August 2011 before the new Trial Chamber (with Judge Moloto presiding, while the Presiding Judge of the Trial Chamber in the first proceedings was Judge Alphons Orie). During the retrial, 12 witnesses for the prosecution testified before the Trial Chamber, while the testimonies of 44 witnesses were provided in written form.

9. It should be emphasized that the first witness who appeared before the Trial Chamber during the retrial was Shefqet Kabashi, former member of KLA, who was arrested in the United States of America and transferred to the Tribunal. The prosecution had high expectations of this witness, who was, to some extent and together with other witnesses, one of the reasons that the proceedings entered the retrial. However, this witness refused to testify. Kabashi asked the acting Prosecutor how he could trust him, knowing that those who committed crimes in Kosovo walked free, and the witnesses who spoke about their crimes had been "killed or disappeared". Kabashi added that he was still alive only by chance ("fortunately, I am still alive") and remained determined in his decision not to testify. The prosecution suggested that his previous statements from 2005 from the proceedings

[a] Although the number of eight individuals is tragic enough, the expression of "only eight" that is used in this text serves the purpose of emphasizing that the so-called KLA is responsible, without a doubt, for the deaths of more individuals than eight in the territory where it acted as an armed formation under the command of Ramush Haradinaj.

[b] Ivan Zaric, who was murdered on 19 May 1998 or around that date as stated in count 1 of the indictment, together with Agron Berisa and Burimi Bejtu, as well as the policeman Nenad Remistar, who, as stated in count 4 of the indictment, was murdered on 13 or 14 June 1998.

Prosecutor v. Limaj and others be admitted into evidence, which was approved by the Trial Chamber. At the end and because of his refusal to testify, Kabashi was found guilty of contempt and was sentenced to two months' imprisonment. The Trial Chamber of the International Criminal Tribunal rendered a judgment on 29 November 2012 and acquitted all of the accused of six counts of the indictment. In addition, the Trial Chamber stated that some of the crimes from counts 3, 4, 5 and 6 of the indictment had been perpetrated, but that there was not enough evidence for the accused to be found guilty of those crimes. As well, the Trial Chamber found in its judgment that the allegations on joint criminal enterprise were not substantiated.

Problems with witnesses

10. In its judgment of 3 March 2008, the first Trial Chamber particularly discussed the apparent problem with the witnesses. More precisely, the judgment states that the Trial Chamber faced significant difficulties in obtaining testimonies from a number of the witnesses. Many of them stated fear as an important motive for their absence from the court. In regard to this, the Trial Chamber gained the strong impression that the trial was held in an atmosphere in which the witnesses did not feel safe because of the list of reasons explained in the judgment. Moreover, as stated in the judgment, parties to the proceedings agreed that there existed an unstable security situation in Kosovo, which was particularly unfavourable in relation to the witnesses.

11. Taking into consideration the problems of provision of testimonies, certain measures of protection were granted for 34 witnesses. In addition, 18 subpoenas were issued in relation to the witnesses who were determined not to testify, even though they were granted measures of protection. Four subpoenas of the Trial Chamber were not served. In one of these cases, the witness decided to testify via video link. In two other cases, the Trial Chamber affirmed the indictments for contempt of the International Court. These witnesses were arrested and transferred to The Hague. Both witnesses had decided to give their statements before coming to the court for contempt of court. After both of the witnesses gave their statements, contempt charges were dismissed. In regard to the fourth witness who did not comply with the subpoena, the Trial Chamber undertook various measures in order to obtain his statement, including the extension of the deadline that was approved for the prosecutor to present the new evidence. However, this witness did not appear before the Court. The prosecutor requested three additional subpoenas, which the Trial Chamber did not approve.

12. Two of the witnesses came before the acting Trial Chamber without subpoenas, but refused to testify when invited. One of them, Shefqet Kabashi, left the Netherlands before the start of the trial and returned to his place of residence in the United States.

13. One of the witnesses who was subpoenaed, witness number 55, started his testimony, only to state that he was under great stress and in fear for his safety and that, as a consequence, he could not complete the testimony. Following consultations with the Victims and Witnesses Section of the Tribunal and the physical examination of the witness, the Trial Chamber concluded that it would be not in the interest of justice to continue with the testimony of witness number 55.

14. In addition to everything aforementioned, we would like to recall that Shefqet Kabashi, former member of KLA, who was selected as a key witness of the

prosecution, refused to testify during the retrial and was willing to endure two months of imprisonment in the Detention Unit, where he was detained for contempt.

15. It should be emphasized as well that the data of the Republic of Serbia's national jurisdiction show that 19 potential witnesses, i.e., individuals who had some knowledge of the crimes for which the accused were charged in these proceedings, were murdered.

16. On the other hand, officials of the Tribunal assert that not one person from the list of the Tribunal's witnesses or individuals who were granted measures of protection by the Tribunal in the proceedings *Prosecutor v. Haradinaj and others* were murdered.

17. Taking all of the aforementioned into account it could be concluded that the *Haradinaj and others* case will be remembered as one of the Tribunal's cases that was conducted in the worst manner, as a consequence of which the individuals accused of (and probably responsible for) grave crimes against the civilian population were acquitted for procedural reasons, i.e., for insufficient evidence.

18. The Republic of Serbia absolutely cooperated with the Tribunal's prosecution in this case and provided to the prosecution all of the requested documents that were in possession of Serbia and gave waivers to the witnesses requested by the prosecution.